

In the Matter of the Petitions )  
for Redetermination Under the ) DECISION AND RECOMMENDATION  
Hazardous Substances Tax Law of: )  
)  
)  
)  
Petitioner )

Nos.

NOTE: DTSC was formerly part of the Department of Health Services (DHS). References to DTSC below should be regarded as including DHS acts and correspondence.

Protested Items

The protested tax and fees are:

<u>Petition Number</u>	<u>Period</u>	<u>Type</u>	<u>Amount</u>
100-11111-110	1/1/87-12/31/89	Superfund	
100-11111-111	7/1/88-6/30/90	Facility	
100-11111-112	4/1/88-3/31/90	Disposal	

Contentions

1. DTSC and EFD contend that petitioner owes the Small Treatment Facilities Fees for fiscal years 1988-90, because the flushing process used by petitioner to clean transformers was treatment.

Petitioner contends that the facility was not a treatment facility, but a storage facility. Petitioner asserts that there was no treatment, just a consolidation or packaging of like wastes for disposal; and that this was "handling", not "treatment". Petitioner also asserts that if the facility is considered a treatment facility by DTSC based upon a January 1993 memo, this is an impermissible retroactive application of the memo.

2. DTSC and EFD contend that petitioner is liable for the Hazardous Waste Disposal Fee as the person who submitted the waste for disposal. DTSC and EFD contend that petitioner created a new waste stream by cleaning transformer carcasses, and became the generator or disposer of the waste.

Petitioner contends that it does not owe disposal fees. Petitioner asserts that the fees were already paid by the generators whose waste was received at petitioner's facility, and any additional charge is double taxation.

3. DTSC and EFD contend that petitioner is liable for the Hazardous Substance (Superfund) Tax as the person who created and submitted for disposal a new waste stream due to its flushing of the transformer carcasses.

Petitioner contends that it does not owe the Superfund Tax as it was not the original waste generator, but merely a transfer station. Petitioner also asserts that a Superfund tax on it is double taxation.

Summary

Petitioner, [redacted], is a corporation which was operating a hazardous waste facility. Petitioner was issued a hazardous waste facility permit by the Department of Health Services, Toxic Substances Control Division (now the Department of Toxic Substances Control). The facility consisted of a transfer station (where waste was accumulated, remanifested, and shipped out for disposal), a polychlorinated biphenyl (PCB) transformer draining and flushing facility, and an incinerator for medical waste. (Verification Comments in Report of Field Audit dated 5/30/91 for account # [redacted].)

Petitioner's transfer station accepted waste from throughout northern California. The waste was grouped by type and by ultimate disposal site. When a truckload of waste was accumulated, it was shipped to the disposal site. The draining and flushing facility accepted transformers containing PCB oils. The transformers were drained and flushed of the oils. The transformers were sent to local landfills for disposal. The liquids were sent out of state for incineration. (Verification Comments in Report of Field Audit dated 5/30/91 for account [redacted].)

According to petitioner, the PCB liquids were stored in tanks segregated by concentration until an economic truckload was accumulated for shipment out. An empty transformer in the case of liquid concentration of >500 ppm was filled with a solvent (diesel fuel) and allowed to stand for eighteen hours. The liquid was then pumped into a storage tank. The empty transformer was filled with an absorbent and stored awaiting shipment out. (8/12/91 Petition for Redetermination, account [redacted].)

Petitioner's revised "Operation Plan", submitted to obtain its hazardous waste facility permit, described the procedure of the draining, flushing, storing, and shipping out of the liquid PCB's from the transformers and of the transformers themselves. Hazardous Waste Transfer Station [redacted] a Operation Plan, Revised August 1984, p. 23.)

The hazardous waste facility permit issued to petitioner by DTSC on April 11, 1985 contains a section describing the facility and states in pertinent part,

"Treatment at the facility consists of draining and flushing of small and large transformers. PCB contaminated liquids will be drained and pumped into the corresponding storage tank for storage. Drained transformers are stored in wooden boxes in the container storage area." (at p. 2.)

Later in the permit document, a portion entitled "Treatment Requirements" reads in pertinent part,

"Treatment activity at the facility is limited to draining of liquids with PCB's from transformers into the storage tanks and the flushing of transformers by Department approved flushing solutions." (at p. 19.)

Petitioner's attorney argued that not until DTSC Management Memo # 92-HWM 18 was issued in January 1993 was petitioner advised that it was considered a small treatment facility. The DTSC memo referred to concerns the definition of "treatment" as applied to the rinsing of electrical transformers. In pertinent part the memo states:

"Health and Safety Code (HSC) Section 25123.5 and CCR Title 22 Section 66260.10 each define 'treatment' as '...any method, technique or process which changes or is designed to change the physical, chemical or biological character or composition of any hazardous waste...' [emphasis added]. The addition of solvents to flush hazardous dielectric fluid from transformers causes dilution of the hazardous residuals, thereby meeting this definition of 'treatment'. Rinsing of transformer carcasses that contain hazardous residuals constitutes 'treatment'. 'Treatment' requires a permit or other form of authorization from the Department."

Ms. Lancaster, who appeared at the Appeals conference as a witness for DTSC stated that she was the project manager contact of DTSC with [redacted]. She stated that the permit issued in 1985 authorized petitioner to both treat and store hazardous waste, as petitioner's Operation Plan described in petitioner's application for the permit. She also stated that [redacted] reviewed the draft permit before it was issued. She stated that petitioner's facility was classified as a small treatment facility.

The audit found differences in the quarterly disposal returns and in the Superfund returns. These differences resulted primarily from petitioner not reporting residues from the PCB draining and flushing process. It was petitioner's practice to remanifest all wastes sent for disposal and attach the incoming manifests for all wastes being transferred. The audit concluded that all manifests without supporting incoming manifests were of wastes generated by petitioner. (Verification Comments in Report of Field Audit dated 5/30/91 for account # [redacted].)

#### Analysis and Conclusions

##### **Facility Fee**

Health and Safety Code section 25205.2 provides that each operator of a hazardous waste facility shall pay an annual facility fee to the Board based on the size and type of facility. The base fee and the variations on the base fee are shown in section 25205.4. Subdivision (d) of section 25205.4 provides that if a facility falls into more than one category, the facility operator shall pay only the rate for the facility category which is the highest rate. The facility fee for a small treatment facility is larger than for a small storage facility.

Petitioner contends that it was not a treatment facility but a storage facility. Petitioner further asserts that it was not "treating" the waste pursuant to the definition in section 25123.5, but merely "handling" the waste pursuant to the definition in section 25116.

Section 25123.5 defines "treatment" as "any method, technique, or process which changes or is designed to change the physical, chemical, or biological character or composition of any hazardous waste or any material contained therein, or removes or reduces its harmful properties or characteristics for any purpose." Section 25116 defines "handling" as "the transporting, or transferring from one place to another, or pumping, processing, storing, or packaging of hazardous waste...."

Without reference to DTSC's management memo, it is clear from a reading of section 25123.5 that draining and flushing a transformer of PCB's is a process which removes or reduces the harmful properties or characteristics of the transformer. This flushing and draining process which combines a solvent of diesel fuel with the PCB's also changes the composition of the hazardous waste within the meaning of the code section. The process goes beyond "handling" as that term is defined by section 25116. The transformers were not merely "packaged", they were "treated" within the meaning of the Hazardous Substances Tax Law.

Petitioner in its own Operation Plan described this process as "treatment", and the hazardous waste facility permit which was issued pursuant to the plan specifically allowed this "treatment". Petitioner was properly classified as a small treatment facility, and the fee for being one properly imposed.

#### **Disposal Fee**

Section 25174.1, subdivision (a) provides,

"Each person who disposes of hazardous waste, or who annually submits more than 500 pounds of hazardous waste for disposal in the state or outside of the state, or who submits hazardous waste for treatment at a location outside of the state, shall pay a fee directly to the State Board of Equalization for disposal of hazardous waste to land. For purposes of this chapter, the fee imposed by this section shall be known as the disposal fee."

The audit concluded that when petitioner flushed and drained the transformers it became a generator of waste through the new liquid combination of PCB's and solvent, and through the transformers which now contained absorbent. Petitioner had not reported the new waste streams created by its treatment of the transformers and the PCB liquids therein, and the audit determined that disposal fees were due on the new waste streams.

Under section 25174.1 petitioner owed a disposal fee on the new waste streams which it created by its treatment of the transformers. The generator of the previous waste stream had not paid and was not liable for any fee on a waste stream created by petitioner, so there is no issue of double taxation.

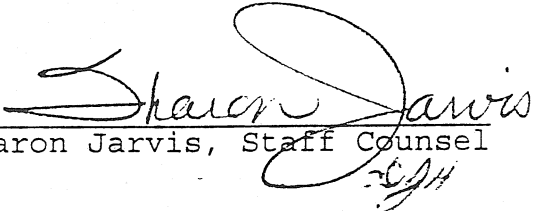
### Superfund Tax

During the period in question, section 25345 imposed an annual tax on certain hazardous wastes as specified in section 25342. Section 25342 in part required that every person who submitted for disposal or who disposed of in this state or outside of this state more than 500 pounds of hazardous waste in the state during the preceding calendar year report to the Board the total amount of hazardous waste which that person had disposed of, or submitted for disposal, in the state or outside of the state.

By creating new waste streams which it submitted for disposal (as discussed above), petitioner was liable for the Superfund tax on the new hazardous waste streams which it submitted for disposal. There is no double taxation of petitioner and the original generator. Petitioner is liable for the Superfund tax on the new waste streams which it created by its treatment of the transformers. The original generator had not paid and was not liable for tax on the new waste streams created by petitioner.

### Recommendation

It is recommended that the petitions for redetermination be denied; and that the tax and fees be redetermined without adjustment.

  
Sharon Jarvis, Staff Counsel

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Date